

# Calendar No. 1962

86TH CONGRESS }  
2d Session }

SENATE }

REPORT  
No. 1892

## ADLER CONSTRUCTION CO.—COURT OF CLAIMS

AUGUST 22, 1960.—Ordered to be printed

Mr. HRUSKA, from the Committee on the Judiciary, submitted the following

### REPORT

[To accompany S. Res. 288]

The Committee on the Judiciary, to which was referred the resolution (S. Res. 288) to refer to the Court of Claims the bill (S. 3199) for the relief of the Adler Construction Co., having considered the same, reports favorably thereon without amendment and recommends that the resolution be agreed to.

#### PURPOSE

The purpose of the proposed resolution is to refer the bill, S. 3199, to the Court of Claims and to authorize the court, under the provisions of sections 1492 and 2509 of title 28 of the United States Code, to report to the Senate such findings of fact and conclusions of law as will enable the Senate to determine what amount, if any, is legally or equitably due the claimant from the United States.

#### STATEMENT

The Department of the Interior has submitted a report to the chairman of the Judiciary Committee of the Senate, dated July 5, 1960, which deals in full with S. 3199. In that report it is stated that the claim set forth in the bill may be divided into three different categories, which have been entitled (a), (b), and (c).

As to (a), the Department of the Interior states:

\* \* \* it is the opinion of the contracting officer, in which this Department concurs, that claim (a) submitted by the

Adler Construction Co. in S. 3199 contains such elements of equity and fairness that relief legislation to the extent of \$136,532.86 is warranted.

The Department of the Interior, as regards portions (b) and (c) of the bill, states as follows:

We further believe that the claims of the contractor set out in (b) and (c) should not be allowed. Should the Congress not be disposed to accept the adverse recommendation regarding these claims, and in view of the wide divergence between the contractor and the Government as to the facts involved, we would then recommend that claims (b) and (c) be referred to the Court of Claims for finding of fact and report to the Congress as to the merits of the claim.

The claim, as a whole, has to do with the bids for and the construction of the Pactola Dam project near Rapid City, S. Dak., in which the Adler Construction Co. submitted a bid in the amount of \$3,761,115. According to the report of the Department of the Interior, this bid was extremely low. In that report it is stated:

It was, of course, apparent that the bid of the Adler Construction Co. was extremely low, and the Board that conducted the bid opening reported that Adler would "almost certainly have to operate at a considerable loss."

The three portions of the claim as set forth in the Department of the Interior report are as follows:

- (a) Claim to rectify a mistake in bid;
- (b) Claim for equitable adjustment for excess costs arising from changed or late conditions with resultant overrun in quantities of work performed; and
- (c) Claim for adjustment based on alleged breaches of contract by the United States.

A review of the report of the Department of the Interior, together with a statement of the case submitted by the claimant to Senators Hruska and Case of South Dakota, lead the committee to the conclusion that this is a proper case for submission to the Court of Claims for its report and recommendations to the Congress.

It is noted by the committee that, insofar as the claim represented by (a) is concerned, the Department of the Interior believes that the claimant is entitled to payment in the sum of \$136,532.86, so that as to this amount there does not appear to be any controversy. For two reasons, however, this portion of the claim is also included in the referral to the Court of Claims, the first reason being that the committee believes that it is better to keep the entire matter in one package rather than to separate a portion of the transaction from the two remaining parts. The second reason is that the court may desire to give consideration as to whether or not there should be any additional award given as regards (a), based on the lapse of time. In reference to claims (b) and (c), the committee believes that due to the conflict in theories taken on the one hand by the Department of the Interior and on the other by the claimant, that the alternative recommendation of the Department of the Interior to refer these claims to the Court of Claims for findings of fact and report to the Congress on the merits

is meritorious. It is, therefore, recommended that the resolution, Senate Resolution 288, be agreed to.

Attached hereto and made a part hereof is the report of the Department of the Interior, together with the aforesaid statement as to the case by the claimant.

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DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE SECRETARY,  
Washington, D.C., July 5, 1960.

HON. JAMES D. EASTLAND,  
*Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR EASTLAND: This responds to your request for the views of this Department on S. 3199, a bill for the relief of the Adler Construction Co.

We recommend the enactment of this bill if it is amended as suggested.

This bill would authorize and direct the Secretary of the Treasury to pay out of money not otherwise appropriated the sum of \$397,200 to the Adler Construction Co., of Littleton, Colo. This sum is in satisfaction of three alleged claims of the Adler Construction Co. which are as follows:

- (a) Claim to rectify a mistake in bid;
- (b) Claim for equitable adjustment for excess costs arising from changed or late conditions with resultant overrun in quantities of work performed; and
- (c) Claim for adjustment based on alleged breaches of contract by the United States.

The bill has the usual provision prohibiting the payment of more than 10 percent of the amount authorized to any agent or attorney for services in connection with the claim.

We feel that the claim of the Adler Construction Co. as set out in (a) above contains such elements of equity and fairness that the Congress would be justified in enacting the bill to the extent of \$136,532.86. We further believe that the claims of the contractor set out in (b) and (c) should not be allowed. Should the Congress not be disposed to accept the adverse recommendation regarding these claims, and in view of the wide divergence between the contractor and the Government as to the facts involved, we would then recommend that claims (b) and (c) be referred to the Court of Claims for finding of fact and report to the Congress as to the merits of the claim.

The contractor has submitted substantially the claim as presented in the proposed relief bill in connection with an appeal to the Interior Department Board of Contract Appeals, however, he has never submitted a definite breakdown of the amount claimed under each of the claim items. We are able to calculate that the amount involved under claim item (a) is \$136,532.86. With regard to claims (b) and (c), it appears that these claims for the most part, are alternative claims for the same or substantially the same items of alleged increased cost. Claim (a) will be discussed first, following which claims (b) and (c) will be discussed together.

The background of claim (a) is extremely complex and involved and we set it forth here in a somewhat abbreviated form.

Bids for construction of Pactola Dam near Rapid City, S. Dak., were opened on September 30, 1952. The Adler Construction Co. submitted a bid in the amount of \$3,761,115. The three next lowest bids were in the respective amounts of \$4,878,476.50, \$5,265,946, and \$5,693,072. Eight other bids were received ranging up to a high of \$6,959,509. The Government's estimate of the cost of the work at the time of opening the bids was \$5,962,341.

It was, of course, apparent that the bid of the Adler Construction Co. was extremely low, and the Board that conducted the bid opening reported that Adler would "almost certainly have to operate at a considerable loss."

Subsequently, after analysis of all bids received and further consideration of the engineer's estimate, that estimate was revised downward to the amount of \$5,349,341. However, the Adler bid was still approximately \$1,600,000, or approximately 30 percent below the revised engineer's estimate. At the time of bid opening, Adler was involved in attendance at court proceedings at Fort Collins, Colo., and was unable to secure an adjournment of these proceedings, in order to give attention to the situation arising out of his extremely low bid. However, on October 14, Mr. Adler advised orally that he suspected a serious error in his bid and requested that the contract not be awarded until the termination of the court proceedings and he had been afforded an opportunity to thoroughly check his computations.

After receiving this oral notice of a claimed error in the bid, the contract was nevertheless awarded. This was predicated upon the fact that Pactola Dam had a very important national defense purpose in supplying water for the Strategic Air Command base at Rapid City, S. Dak., and it was necessary that work be initiated in the fall of 1952. Otherwise, it was contemplated that inability to perform certain initial work in the fall of 1952 might result in a full year's delay in construction. It was not intended by the award of contract to prejudice Adler's claim of error, but rather the intention was to make possible the simultaneous handling of all aspects of the matter, including the procurement of a performance bond, securing execution of contract documents, and processing the claim of error, if a definite claim was presented by Adler. It may be noted that it had been brought to the attention of the Bureau of Reclamation by Adler that he was experiencing considerable difficulty in securing a commitment by his surety for furnishing a performance bond in view of the extremely low bid, and the surety's concern as to whether he could perform the contract without serious losses that might ultimately have to be assumed by the surety.

By letter dated October 18, 1952, Adler submitted the company's estimate sheets, sworn to as being original estimates, and reflecting that seven errors had been made in computing its bid. Based upon the estimated quantities of work involved in the items as to which error was claimed, the amount of the error was \$621,465.

The claim of error was promptly submitted to the Comptroller General in accordance with usual procedures, and the result was a decision, dated November 14, 1952 (decision B-112673), determining that errors had been made by the Adler Construction Co. as claimed.



and authorizing the Bureau of Reclamation to correct the bid and enter into formal contract on that basis.

On November 17, 1952, a conference was held with Mr. Harold C. Adler in Denver, Colo., with regard to the situation presented by the Comptroller General's decision. At this conference the Government representative advised Mr. Adler that they had received teletype notification that his claimed errors in bid had been allowed by the Comptroller General, although a copy of the Comptroller General's decision was not at that time in the hands of the contracting officer. The Bureau of Reclamation had previously been giving serious consideration to all aspects of the Adler claim of error, and had come to the conclusion that notwithstanding the extremely low amount of the total bid, the errors should not be corrected in a manner that would result in any individual unit or lump-sum prices exceeding a conservative and fully justifiable price as determined by the Government for the respective items. Accordingly, Adler was approached on the proposition of granting the Government concessions in the form of reduction of the unit prices on certain of the items below the amount of the unit prices with the correction as allowed by the Comptroller General. Mr. Adler did not offer any serious objection to the Government's proposal, and accepted the reductions as proposed by the Bureau. The result of these reductions was embodied in an amendatory agreement dated November 17, 1952, and pursuant to this agreement, the increase in contract amount based on the error was reduced from the amount of \$621,465 as allowed by the Comptroller General to \$485,265. As above stated, it has now been computed on the basis of final quantities that the reduction in the contractor's earnings as a result of the amendatory agreement was \$136,532.86.

It is believed that the Government has technical legal defenses (i.e., statute of limitations and failure to reserve the claim in the contractor's release on the contract) to the contractor's claim which would preclude his recovery in the courts. And, apart from the technical defenses, it is doubtful that on the merits the contractor could successfully establish either that duress was involved in securing his consent to the amendatory agreement, or that the amendatory agreement was invalid for lack of consideration. However, the Congress, in certain hardship situations, has granted legislative relief where the applicant does not have a legally enforceable claim but has a claim presenting strong moral and equitable considerations. Considered in this light we are of the opinion that Adler's claim for relief insofar as claim (a) is concerned, has such compelling considerations of fairness that congressional relief would be warranted.

In reaching the above conclusion, a number of considerations are involved. In the first place, Adler was placed in an exceedingly precarious position by the fact that his bid was so very low in comparison with other bids and the engineer's estimate as to raise doubt as to his ability to perform the contract without ruinous losses. This situation was complicated by the fact that he was involved at the time in litigation from which he was unable to free himself for a sufficient period to give full consideration to the problem. His situation was further aggravated by the fact that there were indications that the bonding company that had furnished his bid bond would not furnish a performance bond to support the contract, and in such event, his bid

bond in the amount of \$376,000 would have been subject to forfeit. This would have had very serious consequences, in all probability resulting in Adler's complete financial ruin. Additionally, the Government's urgent need to get the work under way impelled it to make the rather precipitous award of contract, notwithstanding the fact that Adler had given verbal notice of serious errors in his bid. Although the award was not made with any intention to prejudice Adler's position, it is obvious that the Government's necessity dictated a course of action which placed him in a most difficult position.

With regard to the negotiations as a result of which Adler was induced to accept the amendatory agreement, personnel who were present at the meeting recall that Adler appeared in response to a telephone call, and was unaccompanied by legal counsel or associates. He offered no serious opposition to the Government's proposal and accepted the proposal precisely as it was made. At the time these negotiations took place, it seemed to the Government personnel involved a proper course of action in the discharge of their responsibilities. However, viewed in retrospect, it is considered that they were overly zealous in their desire to safeguard the Government's financial interests, and that the contractor, subject to such pressures as he was under at the time, had or at least thought that he had almost no alternative to accepting a proposition that was seriously adverse to his interests and one that it is now felt, in good conscience, the Government should never have made.

Even with Adler's bid corrected in the full amount of the error found by the Comptroller General, it would still be some \$600,000 below the next low bid and approximately \$1,100,000, or 25 percent below the revised Government estimate. It is apparent that even with the error as allowed by the Comptroller General, the Government had the advantage of an exceedingly low bid. As a result of performing the contract at the contract price, including the prices in the amendatory agreement, the contractor suffered ruinous financial losses, and he has been forced to sell much of his construction equipment. Since completing the Pactola Dam job, he has been unable to secure bonds covering jobs of any substantial volume of work, and has been confined largely to subcontracting small jobs from other contractors.

In view of the foregoing, it is the opinion of the contracting officer, in which this Department concurs, that claim (a) submitted by the Adler Construction Co. in S. 3199 contains such elements of equity and fairness that relief legislation to the extent of \$136,532.86 is warranted.

As stated above, claims (b) and (c) are based on Adler's contention that changed conditions were encountered in the performance of the work which resulted in large overruns in quantities for which he is entitled to additional compensation, or alternatively, pursuant to claim (c) that he is entitled to additional compensation because of breaches of contract by the Government.

It is Adler's contention that during the performance of the work it was necessary that excavation for the dam foundation be carried down to an elevation considerably lower than had been anticipated by the Government; that as a result of the additional volume of work that had to be performed in order to complete the contract, the contract overran the performance period by something over 1 year; and

that as a result of this prolongation of the job, due to changes in economic conditions, winter work and unfavorable weather during the extra year, and other causes, costs of performance were considerably increased. The contractor contends that the situation was greatly aggravated by the action of the contracting officer in the summer of 1955 in failing to grant what the contractor regarded as a full and adequate time extension with the result that, threatened with heavy liquidated damages, he found it necessary to prosecute the work through the winter.

It is true as contended by Adler that substantial overruns in quantities were encountered in connection with several of the major items of work, notably those pertaining to the excavation for the dam foundation and resulting increase in material required to refill this excavation. As a consequence of these quantity overruns, the contractor was granted a time extension in the amount of 257 days for completing the work. However, during the life of the job, the contractor never presented any claim such as claims (b) and (c) for increased costs due to prolongation of the job. Incident to the completion of work, in accordance with a provision of the contract, the contractor was required to furnish a release on contract releasing all claims except those that were specifically set forth as exceptions. The release on contract submitted under date of November 29, 1956, reserved claims in the total amount of \$198,633.20. It is our view that the claims reserved were based solely upon erroneous quantity determinations under a number of items of work, and were for payment at contract unit prices for additional quantities.

Adler was, we believe, dilatory in supplying specific data and in making the necessary check of Government records to substantiate the claims reserved in the release on contract. As a result of this delay in checking records and presenting details as to his claim, the contracting officer on February 7, 1958, issued a findings of fact allowing the amount of \$530.75 in correction of one error that the Government itself had discovered and denying the remainder of the claims because of the contractor's failure to present supporting data. The contractor appealed this finding to the Interior Board of Contract Appeals and, in his notice of appeal, for the first time advanced the contention that he was entitled to additional compensation based upon changed conditions, overruns in quantities and prolongation of the job. Subsequently by agreement with the contractor, the matter was remanded to the contracting officer for further consideration of detailed data to be presented by Adler. Thereafter, several conferences were held with Adler and project records were reviewed, as a result of which a supplemental findings of fact dated November 14, 1958, was issued making additional corrections under six items with a total allowance of \$13,558.53. The claim for additional compensation based upon alleged changed conditions encountered in foundation excavation as was then being asserted was denied on the basis that no such claim had been reserved in the release on contract. The quantity corrections allowed in the decision of November 14, 1958, were arrived at after negotiation and discussions with the contractor, and concurrently with the receipt of the findings of fact, the contractor gave the Government a letter stating that the supplemental findings of fact was accepted

"as satisfactory settlement of all claims arising under the contract," with the following exceptions:

"We reserve all the rights in connection with our claim as outlined in paragraph IV of our notice of appeal dated March 3, 1958, in which we claimed additional compensation for increased costs on the items stated therein, because these additional quantities extended the performance of the contract beyond the period foreseeable at the date of its execution."

Thereafter, Adler appealed from the supplemental findings of fact, pressing the contention that he was entitled to additional compensation on the ground that his unit costs had been increased by the prolongation of the job as a result of the increased quantities of work required to complete the contract. Also, in his brief in support of the appeal Adler presented another contention to the effect that his costs were increased by the action of the contracting officer in refusing to act promptly in granting extensions of the contract period, with the result that he was placed under the pressure of prosecuting the work through a winter or face the prospect of assessment of liquidated damages.

The Government's position before the Interior Board of Contract Appeals was that the contractor had reserved no claims in the release on contract other than claims based upon errors in quantity computations which claims had been settled and were not involved in the appeal and that the claim based upon either changed conditions prolonging the job and increasing the cost of the work or claims of inefficient operations because of duress had not been reserved in the release on contract.

In addition to the contention that the claims now presented had not been saved in the release on contract, the Government directed attention to the fact that an interim settlement had been reached with the contractor in July 1956 regarding all claims then pending at which time no mention had been made by the contractor of the claims now presented in claims (b) and (c). This meeting arose out of the fact that in July 1956 the job was nearly completed and the Government's construction engineer in immediate charge of the work was being transferred to a foreign assignment with the Government. It was considered desirable to discuss all matters then pending between the Government and the contractor while this engineer was still available with a view to settling all matters as to which agreement could be reached. Accordingly, conferences were held with the contractor, as a result of which order for changes No. 5 was issued as a settlement of pending claims. In this order for changes, Adler was allowed compensation amounting to approximately \$43,000 on claims considered payable by the Government. Also, agreement was reached with the contractor as to the extension of time that would be allowed. Following this settlement, Adler gave the Government a letter acknowledging the agreement reached between the parties as a settlement of all claims arising prior to that date. This letter is quoted in pertinent part as follows:

"This will confirm the understanding reached in conference that the payment by the Bureau of Reclamation of the sum of \$43,314.39 to us for extras and changes as discussed at the conference will be ac-



cepted as settlement in full of all claims for additional compensation under the contract arising out of work performed to date.

"Upon the Bureau's execution of a formal contract document providing for the above payment, all claims for additional compensation presently pending will then be considered as withdrawn without further action by the contractor, and no new claims for additional compensation will be made on the basis of anything occurring prior to July 6, 1956."

Adler now contends that this letter has no binding effect because it was given under circumstances amounting to duress. It was known to the Government at that time that Adler was having financial difficulties. However, the Government personnel who participated in the conferences completely disavow that any pressures were exerted on Adler to reach a settlement of outstanding claims and assert that the settlement, as far as they were aware, was based upon the mutual desire of both parties to arrive at an agreement with regard to claims arising out of past performance of the work. At the time of this settlement there was discussion between the parties as to the proper classification of some of the excavation that had previously been performed, Adler contending that some material that had been paid for by the Government as "excavation, overburden" should have been paid at the higher bid price shown in the schedule for "excavation, all classes." Adler's contention that there had been misclassification of some of the material was not considered to be meritorious, and no change was made as to the classification. Adler made no mention at that time of any claim that the overrun in quantities of work, most of which had then already occurred, had increased or were expected to increase his unit costs, and he gave no indication that he considered he was being subjected to any pressure to reach any settlement against his will. In fact, the first time the contracting officer was aware of any claim made by Adler that he was claiming any compensation above contract unit prices was when Adler submitted the appeal from the findings of fact and decision of February 7, 1958, which is mentioned above.

During the pendency of the appeal from the supplemental findings of fact, two conferences were held before a member of the Board with regard to a motion by the Government's counsel to dismiss the appeal, and arguments were presented on behalf of both the contractor and the Government supporting their respective positions. The Board of Contract Appeals rendered a decision dated January 4, 1960, in which it dismissed the claim for lack of jurisdiction, holding that the claims presented by Adler were "founded either on misrepresentation or call for recovery of unliquidated damages" and that such claims were not within the Board's jurisdiction.

During the life of the job, the contracting officer visited the job-site, had special representatives visit the jobsite from time to time, and received regular reports from the construction engineer in immediate charge of the work. Conferences were also held with the contractor from time to time as situations arose requiring consideration by the contracting officer. At no time during the life of the job or in any of the conferences with the contractor was the question of changed conditions ever mentioned with regard to a claim for

increased cost. When it became apparent that the work was falling behind schedule, the contractor by letter dated August 31, 1955, requested a time extension based on changed conditions and the overrun in quantities of work performed, but he made no mention and gave no indication that he was dissatisfied with the unit prices stated in the contract for the work that was being performed, his contention being only that he was entitled to extension of the performance period. In none of the conferences with the contractor was any mention ever made of a claim for additional compensation due to prolongation of the job.

With regard to any possible basic merits in the claim regarding changed conditions, it is the view of the contracting officer that changed conditions entitling the contractor to an adjustment under the contract were not encountered in the performance of the work. It is true that the quantities of several items of work did overrun rather substantially. However, this is a very common and frequent experience, particularly in dam foundation excavation. It is impossible in advance of performance of the foundation excavation to make an accurate appraisal of the amount of material that will have to be removed before sound foundation is reached at all points. The specifications are written to provide for the performance of the quantity of excavation necessary to expose satisfactory foundation be it more or less than the estimated quantity stated in the bidding schedule. It would only be in the case where conditions encountered in the performance of the work were more difficult than could reasonably be anticipated that a changed condition could properly be recognized with regard to a dam foundation. There has been no contention by Adler that the units of work performed were any more difficult of performance than the units bid upon, the contention merely being that by reason of the excess quantities the job was prolonged a year and that his costs were increased by reason of the extended performance period.

With regard to Adler's contention that the contracting officer's failure to grant a timely extension of the contract period forced him to prosecute the work in an inefficient and uneconomic manner during the winter of 1955-56, in November of 1955 Adler was given an open-end time extension based upon the overrun in quantities of work performed and this time extension provided that a later determination would be made of the precise period of the extension to which he was entitled. The findings provided that in the meantime no liquidated damages would be assessed. In the subsequent findings that were eventually issued, the contractor was given all of the time that could, under any rational view of the matter, be allowed on the basis of overrun in quantities. Accordingly, contrary to the contractor's contentions that he was forced to prosecute the work in winter by reason of his not being granted a timely extension of the contract period, the winter work as performed was necessary even with the extensions later allowed in order to meet his own contract obligations and thus avoid the assessment of liquidated damages at the rate of \$1,000 per day as provided in the contract.

Based upon the foregoing, we cannot recommend legislative relief allowing the contractor's claims (b) and (c). Should the committee, notwithstanding our views, consider these claims further, then, in view of the wide divergence between the contractor and Government

personnel as to the facts involved, a referral of these claims to the Court of Claims for findings of fact and report to the Congress pursuant to title 20 United States Code, sections 1492 and 2509, would appear to be indicated.

To carry out our recommendations that claim (a) should be allowed in part, the bill should be revised as follows:

Page 1, line 6, change the figure "\$397,200" to "\$136,532.86".

Page 2, lines 1-9, insert a colon following the words "South Dakota" in line 1 and strike the balance of that line and lines 2 through the colon following the word "contract" in line 9.

The Bureau of the Budget has advised that there would be no objection to the submission of this report to your committee.

Sincerely yours,

ELMER F. BENNETT,  
*Under Secretary of the Interior.*

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STATEMENT AS TO CASE OF ADLER CONSTRUCTION CO. ARISING OUT OF  
CONSTRUCTION OF PACTOLA DAM, RAPID CITY, S. DAK.

*To the Honorable Roman L. Hruska, U.S. Senator from Nebraska,  
and the Honorable Francis Case, U.S. Senator from South Dakota:*

INTRODUCTION

The contractor respectfully presents, for your information and assistance, the following statement of his situation arising out of the construction of Pactola Dam, near Rapid City, S. Dak., this dam being a now-completed project of the U.S. Bureau of Reclamation.

First, a synopsis is presented. Thereafter, a more extended "Statement of the Case" is set forth. Certain other items are attached, which, it is hoped, will enable you more fully to understand the matters involved.

SYNOPSIS

Contractor discovered a gross error of \$621,465 in his Pactola Dam bid of \$3,761,115 for contract unit price work. His erroneous bid of \$3,761,115 was \$1,117,361 below the next lowest bidder, and \$2,201,226 below Government estimate. In spite of written notice to Government that his bid was not acceptable except as corrected to his intended bid, and in spite of representation by the Bureau that it would refrain from making award until contractor had had opportunity to present his plea for correction of bid and supporting evidence to Comptroller General for decision, Bureau suddenly made accelerated award, hazarding bid bond of \$376,112, and then, while concealing from the contractor the fact that the Comptroller General had already ruled that correction of his bid could be fully made in amount of \$621,465, knowingly and improperly compelled contractor, who had no legal counsel, to sign an amendatory agreement disallowing \$136,200 of the amount of the error which should have been fully corrected.

Additionally, contractor encountered changed or latent conditions materially different from those represented and expected to exist. Contracting officer refused to make equitable time extension and

monetary adjustment, while at same time threatening to impose liquidated damages for several months at rate of \$22,500 per month. Excess costs developed which contractor asserts are to be borne by Government.

The performance period of the contract extended over several years. Original performance period was 950 days from November 17, 1952, to June 25, 1955, and was completed August 15, 1956 (as date was extended), and accepted September 11, 1956.

Administrative remedies have been exhausted.

#### STATEMENT OF THE CASE

The contractor (Adler Construction Co., a small operator, of Littleton, Colo.) bid to the U.S. Bureau of Reclamation on the Pactola Dam project on September 30, 1952, in the total amount of \$3,761,115. After bids were opened, it was apparent that Adler was \$1,117,361 lower than the next lowest bid (\$4,878,476) and \$2,201,226 lower than the original Government estimate. Adler immediately reviewed his computation sheets and discovered a gross error of \$621,465 omitted.

Before any award was made, the contractor reported the error in writing and requested that no award be made pending presentation of the matter to the Comptroller General. Representatives of the Bureau of Reclamation advised that award would be withheld pending submission by the contractor of his showing. The contractor also, before award, advised the Bureau that his bid should be completely rejected, or, in the alternative, that the contractor be allowed to correct his bid to eliminate the error.

Suddenly, on October 14, 1953, the Bureau completely reversed its position and made a precipitous award, thereby placing the contractor in a position of extreme financial distress. Thus, his bid bond of \$376,112 was threatened with capture if the contractor should refuse to sign a contract frozen to the erroneous bid figure, which figure, as stated, was erroneously \$621,465 below that which was intended by the contractor. And if, to save the bid bond, the contractor were to sign the contract with the erroneous bid amount, then the contractor would have suffered a loss of \$621,465 gross amount of the contract.

Following such maneuver, the Bureau's representatives advised the contractor on October 15, 1952, that it has no authority to grant the relief requested (i.e., acceptance of the bid as corrected to the intended amount); that such authority was reserved to the Comptroller General. Hence, the contractor at once presented his request and showing to the Comptroller General.

Up to this time, no contract whatsoever had been signed.

Following this presentation to the Comptroller General, the Bureau's representatives called the contractor in for a conference on November 17, 1952. In such conference, the Bureau's representatives advised the contractor that they could allow some relief, but they did not disclose to the contractor the text of any decision from the Comptroller General, nor did they disclose to the contractor that the Comptroller General had held that the entire of the error in bid could be rectified.



While thus withholding such information, the Bureau's representatives knowingly and improperly took advantage of the financial distress in which the Bureau's representatives had placed the contractor, and, having placed him in fear of receiving no adjustment at all, they compelled him to sign a purported amendatory agreement and a construction contract for \$136,200 less than the amount of his intended bid, even though the only bid available for acceptance would be the contractor's corrected bid amount.

During such events, the contractor had no legal counsel, and such was known to the Bureau's representatives. All instruments, including the amendatory agreement, were drafted by Government representatives.

While the Bureau declined to recognize the contractor's error in bid, and thwarted the decision of the Comptroller General from having effect, the Government, following the time when it had compelled the contractor to sign under such duress and improper actions of the Bureau's representatives, then corrected and reduced its own estimate by \$613,000, or nearly as much as the contractor's error of \$621,465, which it would not permit the contractor to correct in full.

By reason of the fact that this case involves a unit price contract, the contractor could not know of the financial effect upon him, until the construction work would be completed and the units finally ascertained as to which the unit prices would be ultimately applied. The work was not completed until August 15, 1956, having been started on November 17, 1952. Acceptance was on September 11, 1956.

During performance, matters were worsened because heavy overruns in certain quantities developed. The contract documents reflected that the Government expected and represented that proper and suitable foundation for the dam would be found at about 10 feet below the original ground surface, and that suitable foundation rock would be existent at such level.

During performance of the work, foundation material suitable to the Government was not reached until the excavation under the main dam had been carried to an additional depth of as much as 18 feet below the elevation which had been expected and represented to be in the elevation of the dam foundation. Such unexpected subsurface and/or latent conditions materially differing from those anticipated or represented by the Government to exist caused the contractor excess and unexpected costs for which he is entitled to be reimbursed. Such excess and unexpected costs arose from excess quantities and from being required to perform the work over a longer period than anticipated, and from being required to perform in winter months at a time when equitable extensions of time to which the contractor was then entitled were denied to the contractor in breach of contract. The contractor had relied upon the Government's representations as to subsurface condition in this connection, and had relied on the contract provisions assuring equitable extensions of time.

Regardless of the fact that the contractor had encountered such subsurface and/or latent conditions, and regardless of the fact that the contractor made a proper application for equitable time extension and monetary adjustment, the Bureau's representatives, in breach of contract and acting arbitrarily, declined to allow such equitable

adjustment, and even threatened to impose liquidated damages at the rate of \$22,500 per month. This created further improper and illegal economic duress upon the contractor.

The total payment to which the contractor believes he is entitled is \$397,200, being (i) \$136,200 attributable to the Bureau of Reclamation's improper abstraction of money from the contractor on the contract, which, in equity, the contractor should be deemed to have had with the Government when the contractor's bid, as intended, is given full effect, and (ii) \$195,000 attributable to excess costs due to changed conditions resulting in unexpected overruns as to items 3, 4, 11, 16, 21, 41, and 43; and (iii) \$66,000 attributable to excess costs due to changed conditions resulting in unexpected overruns in items 2 and 23.

A copy of the contractor's preliminary brief in support of appeal of Adler Construction Co. is attached, dated August 15, 1959, with list of exhibits (exhibits themselves being omitted at this time).

The contractor has exhausted his administrative appeals without obtaining the relief to which he is entitled. The Board of Contract Appeals, Department of Interior, dismissed the matter on the asserted ground of lack of jurisdiction, under date of January 4, 1960; and further denied on January 20, 1960, the contractor's petition for reconsideration. Copies of both decisions are attached hereto.

Dated February 12, 1960.

Respectfully submitted.

ADLER CONSTRUCTION Co.,  
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*Its Attorneys*

LINCOLN, NEBR.

